IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1533 OF 1985

The Board of Trustees of the
Port of Bombay .....Plffs.
vs.
Laldee P.Ltd and Ors. .....Defnds.

Mr. V.J. Makhija i/b. Motiwala and Co. for the plaintiffs.

None appears for defendant no.1 though served.

Mr. Navneet Shah with Salil Shah i/b. M/s. Bhaishankar Kurga i/b. Girdharlal for defendant no.2.

Mr. Chirag Balsara i/b. Bhatt and Saldanah for defendant no.3.

CORAM: S.U. KAMDAR, J.

DATE : 4TH AUGUST, 2005.

JUDGMENT :

1. The present suit has been filed by the plaintiff which is a statutory corporation under the provisions of the Major Port Trust Act, 1963.

Under the provisions of the Major Port Trust the plaintiff is the owner of the docks at Bombay and under the provisions of the said act the plaintiff is empowered to take charge of the goods landed from the ships coming to Bombay and also entitled to various charges inrespect of the wharfage, demurrage and other charges. The scales for the said charges are duly prescribed.

2. Sometime in or about 1974 the first and the second defendant imported 54 bundles containing steel strips which were manifested at Item No.500 of the Import General Manifest No.1791 dated 19.3.1974. The defendant no.2 was the canalising agent at the relevant time and by virtue of its status as canalising agent was the sole agency for importing the said goods. The said goods arrived at Bombay in a vesssel known as ‘S.S. STATE OF MEGHALAYA’. The goods were landed on 8.4.1974 and the last free day to release the goods by the plaintiff without levy of any charges was 15.4.1974. On 31.5.1975 an outturn was drawn inrespect of the said 54 bundles and it was shown

that the said goods were lying at Haji Bunder Dump. The consignment of the said steel strips was not cleared by the defendant no.1 and/or the defendant no.2. The third defendant in the suit is the owner of the vessel and has been sued in its capacity as a bailor because the said vessel has discharged the said cargo at the port into the custody of the plaintiff. According to the plaintiff the defendants were bound and liable to take delivery of the said goods and clear the same within a period of 7 days which were prescribed as 'clear days' from the date of the landing and subsequently the said consignment was liable to wharfage and demurrage charges and other charges of the plaintiff. It is the case of the plaintiff that the said consignment was landed on 8.4.1974 and period of 7 clear days were over on 15.4.1974 still the defendant did not clear the said goods for more than two months and accordingly in exercise of power conferred under s.61 and 62 of the Major Port Trust Act the plaintiff placed the said goods for public auction in Lot No.J/2233. The notice of sale was sent by the plaintiff to defendant no.1, 2

and 3 and called upon them that the consignment if not cleared then the same will be sold and the amount received will be adjusted against the port trust dues. The first defendant thereafter through their advocate replied and inter-alia stated that the defendant no.1 has filed a suit in this court being Suit No.1370 of 1975 against Hindustan Steel Limited and the third defendant for damages for causing delay in clearing of the said consignment. The second defendant is not the importer of the said consignment since the second defendant has sold the said consignment on High Sea Sales basis and thus the second defendant is not liable to make payment of the said charges.

3. Since the said consignment was not cleared the plaintiff published a sale notice in Maharahstra Government Gazette (II) dated 5.6.1975 and also gave a newspaper notice in Free Press Journal on 5.6.1975; and ultimately the consignment was sold by the plaintiff sometime in or about 14.6.1982. The said consignment was sold under Lot No. J/2233 and the amount received by the plaintiff from the

sale proceeds was Rs.3,01,548.50/-. It is the case of the plaintiff that for a period of two years the port trust charges accrued on the said consignment amounted to Rs.22,70,109.40/- and custom duty paid by the port trust on them was Rs.1,30,526.56p and ITC fine was imposed of Rs.1,80,000/- and the expenses for conducting the sale was incurred by the plaintiff of Rs.34,993.75p. The plaintiff adjusted the sale proceeds under the various expenses, customs duty and according to the plaintiff after giving adjustment of the balance of the sale proceeds against the port trust charges there remained a deficit of Rs.22,15,534.30p. By letter dated 15.5.1985 the plaintiff informed all the three defendants of the aforesaid position and called upon them to make payment of Rs.22,15,534.30p towards the repayment of the port trust dues inrespect of the wharfage and demurrage incurred on the said consignment. It is the case of the plaintiff that neither the defendant replied to the said notice nor paid the said amount and thus the plaintiff filed the present suit for the recovery of amount of Rs.22,40,000/- which included

interest of principal amount of Rs.22,15,534.50/- as on the date of the suit and has claimed further interest at the rate of 15%p.a. from the date of the suit till payment and/or realisation. The defendant no.1 has not filed any written statement in the present suit nor he has appeared or contested the present suit. In so far as the second defendant is concerned the second defendant has filed the written statement and has contended that the second defendant is a designated canalising agency in terms of the import and export policy published by the government of India from time to time and the said defendant no.2 never effected import of any consignment and before the said consignment is imported into India the said consignment is sold by the defendant no.2 on high sea-sales basis. It is the second defendants case that in the present case also by invoice dated 5.3.1974 the defendant no.2 sold the goods to defendant no.1 on high-sea-sales basis and once the said sale is effected the defendant no.2 is not liable to make payment of wharfarage and demurrage charges which is incurred subsequent to the

effecting of the sale by the defendant no.2 in favour of the defendant no.1. Thereafter the defendant no.2 has denied the various averments and statements made in the plaint and denied the quantum of liability payable by the defendant no.2 to the plaintiff on an assumption that the defendant no.2 is at all liable for the aforesaid amount. The defendant no.2 has also contended that there is an unreasonable delay in effecting the sale in as much as the sale was advertised as far back as on 5.6.1975 still the sale of the said goods was effected only on 14.6.1982. Thus there was a delay of almost seven years in effecting the sale of the said goods. According to the written statement the claim if any as against the second defendant has become barred by the law of limitation as the cause of action arose in 1975 and still the plaintiff has taken no action either for the recovery of the same by sale of the said goods or by claiming the amount by filing a suit in this court. It has been thus contended in the written statement that the delay is most fraudulent and dishonest. Thus the delay has resulted in the

non-availaibility of the best of the price available at the relevant time and in any event the said goods were lying for seven years in the dock which has resulted in deteriorating of the quality of the said goods. It is thus denied that the plaintiff is entitled to any amount whatsoever as claimed in the suit. It has been thus contended that the suit should be dismissed.

4. The defendant no.3 has also filed the written statement. The defendant no.3 has denied the liability and has contended that the defendant no.3 is not the owner of the goods or importer of the goods. It has been contended that the defendant no.3 is merely the shipper of the said goods and once the bill of lading is endorsed in favour of the defendant no.1 or the defendant no.2 then in that event the liability of the defendant no.3 inrespect of the import of the said goods cease to exist and thus the defendant no.3 cannot be held liable for non payment of the wharfage and or demurrage charges by defendant no.1 and/or defendant no.2. The defendant no.3 has also denied

various allegations in the suit made by the plaintiff against the defendant no.3.

5. On the aforesaid pleadings the issued were framed by the learned single judge of this court on 8.11.2003. The said issues are as under :

1. Does the plaintiff prove that the plaintiff is entitled to recover charges from all the defendants jointly and severally as commission ?

2. Does the defendant no.2 prove that it is a only a canalising agent and is not at all liable to pay anything to the plaintiff /

3. Does the defendant no.3 prove that they are the owners of the vessel and their duty was only to hand over the goods to the carrier of the good and that they are not liable to pay anything to the plaintiffs /

4. Do the defendants prove that the suit is barred by limitation ?

5. Whether the plaintiffs prove that the port trust charges were amount to Rs.22,70,109.40/- paise ?

6. What decree and order ?

6. On the aforesaid pleadings and issues the

matter went on trial and the plaintiff has examined two witness one Mr. Sanjiv Kumar and Mr. Shailesh Chavan who have deposed and have produced certain documents from the record. The second witness of the plaintiffs has produced certain additional documents which were not produced by P.W.1. Neither of the witness have any personal knowledge but both the witness have deposed to the facts on the basis of documents on record. The documents which have been produced by both the witness and marked as exhibits in the present proceedings inter-alia includes the extract of the Import General Manifest No.1791. The notices which are given by the plaintiffs to the defendants for the sale of the said goods and correspondence between the parties, the notice of sale published in the Maharashtra Government Gazette as well as in the newspaper have also been produced. The P.W.no.2 has in addition thereto produced a copy of the worksheet, relevant page of the outturn book and the document indicating the sale of the said goods. A summary account of the sale has also been produced by P.W. no.2. P.W.NO.1 as well as

P.W.No.2 has been extensively cross-examined. In the course of the cross-examination of P.W.no.1 by the second defendant, the P.W. no.1 has admitted that he is not personally aware of the facts of the case. He has also stated that the various documents such as the Import General Manifest, Tallysheet, outturn report has not been available and therefore cannot be produced. He also admitted in his cross-examination that the bill of entry, packing list and invoices are also not produced from the record which has been filed for the purpose of clearing of the said goods. However he has deposed that every bundle which is imported and landed at the port are always imported with the identification mark for the purpose of identification of the said goods. He has stated that he cannot recollect what was the mark of identification inrespect of the 54 bundles being the subject matter of the present consignment. He also admitted that in 1975 though the said goods were put for auction the said auction was not conducted because on the request of the defendant no.1 the same was postponed. He has deposed in his

cross examination that he is unable to produce all the documents pertaining to the said consignment. He has also deposed that the plaintiff maintains a sale register in the office but he is not aware whether the same is available or not. He admitted in his cross examination that the goods were lying in Haji Bunder area before effecting sale of the said goods. In so far the calculation of the demurrage charges is concerned he was unable to give the details of the said calculation. He has also deposed that he has not produced the record to show that how the said claim of the plaintiff in the present suit has been computed and/or arrived at. In view of some lacuna in the evidence of P.W. no.1 the plaintiff put forward another witness P.W. no.2. He has produced additional documents and made himself availaible for cross examination. In his examination in chief he has produced large number of documents including the work sheet and the audited worksheet which inter-alia in detail sets out the sale price realised by the plaintiff, the expenses incurred by the plaintiff on the said sale of the goods, customs duty paid, ITC fine etc.

He has categorically deposed by relying upon the worksheet that the plaintiff has filed the suit inrespect of the wharfage and demurrage charges and other dues only for two months. Though the auction has taken place in 1982 the plaintiffs have not claimed the charges for the subsequent period but restricted to a period of two years from the date of the landing after excluding seven clear days. The P.W.No.2 was also cross examined in detail. He is cross examined on the procedure for sale of the goods and various documents produced by him. In the cross examination he has deposed that he is unable to produce the documentary evidence in the form of voucher or bills to show the amount actually paid by the plaintiffs to the various parties towards the sale expenses, custom duty etc. He has also deposed that he has produced the record whichever was available which inter-alia includes the audited work-sheet. He has identified the consignment in the present case by virtue of import General Manifest No. 1791 and has stated that the said goods are sold. When he is questioned about the identification mark of the consignment he has

stated that when the goods are landing there is identification mark but once the goods are noted in Import General Manifest the said goods are referred to by the said IGM number and Lot number therein. He has also deposed that the plaintiff issued various notices to the defendants threatening to sell the goods but the plaintiff could not sell the goods because of the request of the defendant no.1 for postponement of the sale and ultimately sale came to be effected only on 14.6.1982. He admitted that there has been a delay in effecting the sale of the said goods.

7. The defendant no.1 has not filed any written statement nor he has appeared. Therefore an ex-parte decree is required to be passed as against defendant no.1.

8. Mr. Shah learned counsel appearing for defendant no.2 has placed before me the following proposition for consideration. It is his contention that the suit must fail because the plaintiff has failed to establish that there was an

auction sale of the goods which were imported. The plaintiff has also failed to show that there was any valuation carried out inrespect of the said goods. Learned counsel for defendant no.2 contended that in the absence of any evidence to establish that there was any valuation carried out on the said goods and subsequently sold the court must hold that there was no auction sale at all by the defendant. The next contention advanced by the learned counsel is that the newspaper notice issued by the plaintiff and/or in the Maharashtra Government Gazzette publication did not identified t he said goods by markings thereon which were placed on the consignment at the time of the landing of the goods for identifying purpose. It is therefore his case that in absence of any markings stipulated in the public notice and Maharashtra Government Gazette the auction sale notice is defective and cannot be related to the suit consignment and therefore also the suit should be dismissed because there is no valid notice or valid publication thereof relating to these goods. Alternatively he has contended that the plaintiff

has in his evidence admitted that the wharfarage charges are levied only for a period of two years i.e. upto to 1976 because the goods are landed in 1974. Thus in that view of the matter the claim of the plaintiff which has been filed in 1985 is hopelessly barred by the law of limitation. Therefore the suit is required to be dismissed. Itis also contended by him that the 2nd defendant being only canalising agency but not the owner of the said goods is not liable for any claim of the plaintiff. It is further contended that in view of the fact that the 2nd defendant have sold the goods to the 1st defendant on ‘High-Sea’ Sales basis i.e. before the goods landed in the dock they cannot be termed as ‘owner’ or ‘importer’ as provided in the Major Port Trust Act and thus they are not liable to port trust charges.

9. The defendant no.3 has supported the arguments of the defendant no.2 on the point of limitation. He has further contended that in any event the defendant no.3 is not liable because the bill of

lading was already endorsed in favour of the first defendant and once the bill of lading is endorsed the liability of the defendant no.3 who is the shipper cease to exist and cannot be enforced by filing the present suit.

10. Firstly let us consider the issue of limitation. Both the learned counsel have contended that the suit is hopelessly barred by the law of limitation and thus the same is required to be dismissed. On the other hand the learned counsel for the plaintiff has relied upon a division bench judgment of this court in the case of **The Trustees of the Port of Bombay vs. M/s. Jayantilal L. Gandhi reported in AIR 1979 Bom.12** in which inter-alia it has been held as under :

> This is a suit to recover the balance of the wharfage and demurrage charges, after giving credit for the sale proceeds. Such amount of deficit could only be ascertained when the auction sale took place on February 6, 1964 and since the appellants have adopted the remedy permitted to them under s. 67-A of the Act, the cause of action for such a suit arose when such deficit was determined upon an auction sale having effectively taken

> place. Thus under section-67-A of the Act the cause of action to recover the balance of the amount, after giving credit for the sale proceeds, accrues, for the first time, when the sale took place, and the deficit of the balance of the amount recoverable is ascertained. Thus, clearly under section -67-A of the Act to recover the amount, the cause of action accrues when such deficit or balance of the amount to be recovered is ascertained. That event took place in the present case on February 6, 1964.

11. Learned counsel hasalso relied upon an unreported judgment of the single judge of this court in suit No. 194 of 1976 in the case of **The Board of Trustees of the Port of Bombay vs. Caravan Hosiery Factory and Ors decided on 20-21.7.1988** in which following the judgment of the division bench of this court the learned single judge has held as under :

> "As laid down by the Division Bench of our court in the case of the Trustees of the Port of Bombay vs. M/s. Jayantilal and Gandhi reported in AIR 1979 Bom. Pg.12, the cause of action in favour of the plaintiffs under Section 67A accrues when the balance of the amount to be recovered is

ascertained. In my view, in cases where goods are under a detention order the actual amount can only be ascertained after the adjudication proceedings by the Customs Authorities is completed.

Thus in the present case the cause of action must be deemed to accrue when q the adjudication by the Customs Authorities is completed. This is so because had the customs authorities adjudicated in favour of the defendants and released the goods, the customs authorities would have been bound to issue a detention certificate for the period during which the goods were under detention. In such a case the plaintiffs would have been bound to grant a remission in the demurrage charges. The evidence of the plaintiffs witness in this behalf has not been questioned by the defendants. Had the plaintiffs before the date of the order of adjudication sought to claim the amount of demurrage charges, the defendants could have refused to pay and have validly taken up the contention that until there is an adjudication the exact amount payable by the defendants cannot be determined. In my view the exact amount chargeable could only be ascertained on the adjudication proceedings being completed. In this case that would be the order of confiscation passed on 28th August, 1973. In this case the suit having been filed within a period of three years from 28th August, 1973 it cannot be said that the suit is barred by the law of limitation.

An additional submission made by Mr. Thakkar must also be noted. Mr. Thakkar has submitted that on 17th January 1981 an order was passed in the Appeal preferred by the 1st Defendants against the order of confiscation. According to Mr. Thakkar the order of confiscation was set aside. Mr. Thakkar submits that under these circumstances, the plaintiffs right to sue must be deemed to have accrued from day to day. He submits without prejudice to the right to claim remission that in this case no remission has so far been claimed and therefore the right to sue must bee deemed to have accrued day to day. In my view Mr. Chinoy is quite right when he submits that no order of the Appellate authority bas been referred to an relied upon by the defendants nor brought on record in this suit and therefore Mr. Thakkar cannot be allowed to ever to refer to it. It must be noted that it is not argued that a detention certificate has been issued and/or that the defendants are now entitled to a remission. Further an event of this sort, subsequent to the filing of the suit can have no bearing on the question of limitation. The right to sue is not dependent on whether there is an order of release by the customs. The right to sue accrues on the amount due being finally ascertained after adjudication by the customs authorities."

12. On the other hand the learned counsel Mr.

Shah has relied upon the latest judgment of the Supreme Court in the case of **Omprakash Biyani vs. Board of Trustees reported in AIR 2002 S.C. 1217.** The relevant portion of the said judgment reads as under :

> 19. Faced with this situation, Mr. Nageshwar Rao submits that the 1st Respondent should have exercised their power of sale under section 62 of the Major Port Trusts Act. He submits that it was the duty of the 1st Respondent to sell off the goods. He submits that the 1st Respondent cannot be permitted to continue to levy demurrage charges when they themselves do not sell of the goods. He submits that after they obtained a stay on 11th May, 1990 the 1st Respondent should have sold off the goods. He submits that the 1st Respondent should not b e allowed to claim demurrage charges after 11th May, 1990. We are unable to accept this submission. Till 19th December, 1989 the goods were under a seizure. Thus they could not have been sold. On 19th December, 1989 the appellant has already obtained orders dated 27th September, 1989 and 15th December, 1989. The orders permitted clearance of the goods. Thus the 1st Respondents were further directed by order dated 2nd February,1989 not to raise any objection to the goods being cleared. Even though they obtained order of stay of clearance they could have sold off the goods when the subject matter of clearance of goods was before the court. Thereafter by order dated 16th September, 1991 the High court again permitted clearance of goods. The interim order dated 16th November, 1991 in the

Appeal filed by the 1st Respondents, also permitted clearance on furnishing a Bank guarantee. At no stage did the appellant informed the 1st Respondent that they were not going to furnish a bank guarantee. Thus the 1st Respondent could not have sold the goods.

20. Mr. Nageshwar Rao then submits that the 1st Respondent had applied to the Appellate court for permission to sell teh goods. he points out that by order dated 10th Januaery, 1992 it was held as follows: ".....After hearing the counsel for the parties, it is not possiboe for this court to specify as to what consequential action the board of Trustees for the part of calcutta is entitled to take in view of non-furnishing of he bank guarantee by the petitioner/respondents. That course ofa action has to be decicded by the appeallant itself. However, we direct that teh appeal shall appear in the list for hearing on 31.1.1982 at the top of the list subject to part-heard.....".

21. Mr. Nageshwar Rao submits that now the 1st Respondents could have sold the goods. He submits that it was the duty of the 1st Respondent to have sold the goods so that further demurrage charges are not incurred. Mr. Jaideep Gupta does not deny that such an application was made by the 1st Respondent. He admits that in the order dated 10th January, 1992 it was held that the 1st Respondent could decide what course of action they should adopt. He submits that as, on 10th January, 1992 the court directed the matter to be listed on 31st January, 1992 the 1st Respondent could not have sold the goods.

22. In our view, the 1st Respondent should

> have sold off the goods at that stage. They are a statutory body. Merely because there is no obligation to sell does not mean that they can allow the goods to lie around. By this time the 1st Respondent well knew that the appellant was not paying the charges. Now the court had permitted them to take recourse to such action as was available in law. Sale is contemplated in the Major Port Trusts Act itself. In our view the 1st Respondent should have now sold the goods. Apart from the fact that demurrage charges would have stopped running, valuable godown space would also have become available to them. On facts of this case, we feel that it would be just and proper that the 1st Respondent not be allowed to charge demurrage charges after 10th January, 1992.

13. In the present case the undisputed facts are that the goods have landed on 8.4.1974. Seven clear days expired on 15.4.1974. The goods were put for auction in 1975. Admittedly the said auction did not take place and the same was postponed from time to time. Ultimately the auction has taken place on 14.6.1982. Applying the principles of the judgment cited above it is clear that the cause of action to recover the amount in the present case arose on 14.6.1982 when the auction sale took place and the claim thus

recoverable by the plaintiff was ascertained after giving the set off to the sale proceeds which is received by the plaintiff in the said auction sale. However the learned counsel for the second and the third defendant has contested the aforesaid claim and has contended that if the claim in the present suit is only upto 1976 then in that event the amount has become due and payable in 1976 itself and cause of action to recover the said money aroused in 1976 and has become barred by the law of limitation within a period of three years from 1976 i.e. in 1979. I am unable to accept the aforesaid contention because even if the claim is restricted to 1976 still the claim amount was not crystalised till the auction of the said goods took place in 1982. In that view of the matter it cannot be held that the cause of action to recover the said amount arose in 1976. The cause of action will arise only when there is a ascertainment of the amount recoverable i.e. debt become crystalised. In view of the judgments of this court referred to above it is clear that debt payable by the defendants to the plaintiffs got crystalised only upon auction sale

which took place in 1982. The present suit is filed within three years from the said date of auction sale i.e. 14.6.1982. In view thereof the contention of the learned counsel for both the defendant nos.2 and 3 on the issue of limitation is required to be rejected.

14. Learned counsel for the defendant no.2 and 3 has thereafter contended that in the light of the judgment of the apex court in the case of Omshankar (supra) wherein the court has held that the port trust authorities are not entitled to claim demurrage charges indefinitely nor the auction of the said goods can be carried out after unreasonable delay. It has been contended that once the cause of action arose for sale of the goods by the auction then in that event it was for the plaintiff trust to auction the same immediately. In the present case according to the second and third defendant the goods were infact put for auction as far back as 1976 and thus the plaintiff is not entitled to continue to claim demurrage charges right upto 1982. Learned counsel

has placed reliance on the aforesaid judgment of the apex court and has contended that the said goods ought to have been sold in 1975 itself since there was no prohibition or embargo on auction sale thereof. The act on the part of the respondents not to sell the goods even though in law they were entitled to sell affects the right of the parties. In any event he has submitted that the accrual of cause of action for limitation ought to be computed on the basis that the goods were available for auction but the plaintiff has failed and neglected to conduct the said auction inrespect of the said consignment. The contention advanced by the defendant nos.2 and 3 in my opinion cannot be accepted. The judgment relied upon in the case of Om Prakash (supra) of the apex court do not deal with the aspect of the limitation at all. The limited issue before the apex court was once there was no prohibition and or any embargo on auctioning of the said goods then the conduct on the part of the port trust authority not to do so and keep the said goods lying in their godown and at the same time levying the wharfage and demurrage charges

would be highly unreasonable and without any merits. After considering the rival submissions I am of the opinion that the judgment of the apex court does not deal with the contention pertaining to limitation for filing of a suit and/or that when does a cause of action arise in such cases. Undoubtedly the cause of action to file a suit arose only after the amount was ascertained as due and payable by the defendants to the plaintiff herein. The judgment of the apex court deals with the justification of the levying of charges by the port trust authority towards demurrage and wharfage even after the said goods were available for auction sale. It is undoubtedly true that the said goods were available for auction sale in the present case as far back as in 1975-76 and thus the port trust authority ought to have sold the said goods as far back as in 1975-76. However in the present case the port trust having restricted their claim only for an initial period of two years i.e. upto 1976 only and having not charged for the demmurage for subsequent period the question of any delay in conducting the auction sale is irrelevant

in the present case. The defendants have not been saddled with the wharfage and or demurrage charges for the entire period of 1976 to 1982. In the light of the aforesaid position in law I do not think on the facts of the present case the judgment of the apex court in the case of Omshankar (supra) is relevant or applicable to the facts of the present case. I therefore hold the issue of limitation in favour of the plaintiffs and against the defendants.

15. This leads me to the next issue which has been raised by the learned counsel for the defendant no.2. The defendant no.2 has contended that the defendant no.2 is merely a canalising agency and not the importer of the goods. Thus it not the ‘owner’ and therefore is not covered by definition under section 2(O) of the Major Port Trust Act. However the learned counsel for the plaintiff has drawn my attention to the judgment of the learned single judge of this court in the case of The Board of Trustees of the Port of Bombay (supra) and pointed out that the said issue has already been

decided and no more a res-integra. It has been held that the canalising agency being the State trading corporation in the said case is covered by the definition under the said section 2(o) of Major Port Trust Act. It has been brought to my notice that the said judgment of the learned single judge was carried in appeal by the State Trading Corporation of India which was the canalising agency in that case being Appeal No. 902 of 1989 and division bench has by its order and judgment dated 27/28.7.1992 has dismissed the appeal and held that the canalising agencies included within the meaning of the word ‘owner’ u.s 2(O) of the said act. Learned counsel for the defendant no.2 has thereafter argued that since they have sold the goods on high sea-sales basis they are not liable inrespect of the said goods nor they can be treated as the owner at the time of landing of the said goods. However same argument was advanced in the aforesaid judgments of this court and the same were not accepted by this court. In the aforesaid judgment it is held as under :

"11 The expression ‘owner’ has been defined under s. 2(o) of the Major Port Trusts Act and reads as follows :

> ‘owner’,(i) in relation to goods includes any consignor, consignee, shipper or agent for the sale, custody, loading or unlading of such goods, and
>
> (ii) in relation to any vessel or any aircraft making use of any port, includes any part-owner, charterer, consignee, or mortgagee in possession thereof."

Prior to the amendment effected on February 1, 1975 by Act No.29 of 1974, the words ‘loading or unloading of the such goods" were absent and the expression ‘owner’ in relation to goods merely included ‘any consignor’, consignee, shipper or agent for the sale and custody,. Shri Thakkar submitted that the definition is exhaustive and unless the corporation is the consignor, consignee, shipper or agent for the sale and custody, it is not open for the Port Trust to demand wharfage and demurrage charges on the assumption that the Corporation is the owner. The submission overlooks that the definition ‘owner’ is an inclusive definition and the legislature has very wisely used the word ‘includes’. The expression ‘includes’ indicates that the legislature never contemplated that the categories of persons set out in the definition are exhaustive, but on the other hand indicates that those categories are merely illustrative. Shri Thakkar referred to Stroud’s Judicial Dictiionary Vol.3 page 1333 and urged that ‘shall include’ is a phrase of extension and not of restrictive definition and is not

equivalent to ‘shall mean’. The learned counsel urged that the dictionary further recites that ‘include’ is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clauses declares that they shall include. The learned counsel relied upon the subsequent passage in the dictionary which reads as follows :

> "But ‘include’ is susceptible of another construction which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the nature significance of the words or expressions defined. it may be equivalent to ‘mean and include,’ and in that case it may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to these words or expressions."

Relying on the above quoted passage Shri Thakkar submitted that while examining the ambit of expression ‘owner’ it should be held that the categories set out therein are exhaustive and are not merely illustrative. The learned counsel submitted that the observations of Lord Catson in the case reported in (1899) Appeal Cases 99 (Dilworth V. Commissioner of Stamps) in this respect were approved by the Supreme Court in the decision reported in A.I.R. 1977 S.C. 90 (the South Gujarat Boofing Tils Manufacturers Association and another V. State of Gujarat and Anr). It is not possible to accede to the submission of the learned counsel that inspite

of the expression ‘includes’ categories set out under the definition of ‘owner’ should be treated as ‘exhaustive’. In our judgment taking into consideration the context in which the expression is used and the object for enlarge definition, it is clear that the categories set out are merely illustrative, The Major Port Trusts Act is enacted for the control and management of Ports and Chapter VI makes provision for imposition and recovery of rates at ports. The importer or exporter is receiving services from the Port Trust and for rendering those services the Port Trust is entitled to recover charges. Shri Chinoy is right in his submission that the liability of the importer or exporter arises because of the use of the Port Trust premises. In accordance with the provisions of the Act it is not permissible to load or unlaod any consignment at any place apart from those which are earmarked by the Government and these places are under control and management of the Port Trust Authorities. To enable the Port tust authories to receover the charges it is whoplly immaterial for the port Trust Authorities to ascertain whether a person is the principal or agent or the owner o the consignment in the sense that the title of teh godos vests in such person. The Act does not set oput as to who are liable to pay th charges, but in natural course of conducat a person who enjoys the services of the Port Trust is liable to pay Port Trust Charges. Shri Chinoy invited out attention to the decision recorded by single judtes of this court holding that as far as the Port trust authories are concerned, they can claim rates and charges from all person who have connection with or interest in the gioosd. Shri Thakkar invited our attention to an unreported decision of the Division Bench of this Court in Appeal No. 108 of 1967 delivered on January 30, 1973. shri Thakkar submitted that while exam,ing the claim as to whether the defendants are the owners of the consignment the division bench examined each

and every category set out in the expression ‘owner’ and recording a finding that the defendants not being the consignor or consignee or shipper or agent for the sale and custody, the defendants are not the owners. shri Thakkar submitted that the decision of the Division Bench is an authority for the submission that unless and until the corporation falls within one of the categories set out in the expression ‘owner’ the corporation cannot be treated as an owner. The decision of the Division Bench is recorded on peculiar facts of the case and cannot be treated as authority for the proposition canvassed on behalf of the Corporation. In our judgment, on the facts and circumstances of the present case, the Corporation cannot escape the liability by claiming that the corporation is not the owner of the consignment.

As mentioned hereinabove the import licence is issued in favour of the corporation and in accordance with the provisions of the Hand Book issuance of letter of authority to defendant no.1 merely enables defendant no.1 to act as an Agent of the corporation. In other words the letter of authority merely creates relationship of principal and agent between the Corporation and defendant no.1 The corporation, therefore must be considered as the principal in respect of the import of the consignment and being the principal the title to the goods vests in the corporation and the corporation is clearly the owner of the consignment. Being the owner o the consignment the corporation is liable to pay the wharfage and demurrage charges, as the port Trust Authorities have rendered services for unloading and storage of the consignment belonging to the Corporation. In our judgment the learned single judge was perfectly justified in holding on the facts and circumstances of the case that the corporation was the owner of the consignment. the fact that the letter of credit was opened by

> defendant no.1 and bill of lading was also in the name of defendant no.1 does not make any difference to the corporation being the principal and defendant no.1 being the agent. The Corporation has not cared to produce on record the bill of lading to indicate as in whose name the consignment was received. The Corporation has also not produced any other documents to establish that the Corporation was not the owner save and except claiming that the defendant no.1 had engaged the services of M/s. Jeenah and Co. as clearing agents. That fact, in our judgment, makes not difference whatsoever to the corporation being the owner of the goods. In our judgment, the learned single was right in holding that the corporation was liable for the claim made by the Prot Trust."

16. In view of the said decision in law it is not possible for me to accept the contention on the part of defendant no.2 that they being the canalising agency are not covered within the meaning of the word ‘owner’ u.s. 2(O) of the Major Port Trust Act and thus I reject the aforesaid submission of the learned counsel for the second defendant.

17. Now turning on the merits of the case learned counsel for the defendant no.2 has contended that the plaintiffs have failed in proving their case in

its entirety. It has been contended that the plaintiff has not proved their claim inrespect of the demurrage charges nor they have been able to produce any evidence to show that infact the goods were sold in auction. The plaintiff has also not produced any evidence to show that the condition precedent required under the provisions of s.61 and 62 of the Major Port Trust Act, 1963 have been complied with. It has been contended by the defendant that since neither the computation of the demurrage charges is proved nor the auction of the said goods have been proved. Thus the question of claiming the amount by the plaintiff in the present suit cannot and does not arise. On the other hand the learned counsel for the plaintiff has drawn my attention to the various documents produced by the plaintiff particularly the evidence of plaintiff no.2 in which he has produced document at ex.P.33 which inter-alia indicates a detailed work out of the amount computed towards the sale and expenses of sale and the total amount of claim pertaining to the demurrage charges. Exh.P.34 and P.35 which is at page-91 of the compilation is a work sheet and

it is complete workout of the demurrage charges from time to time. Exh.P.34 gives details about the dock charges of the packages unclaimed and the goods sold by public auction indicates the working of the claim of the demurrage charges for the aforesaid period of two years. Thus on record there is material to show the amount of claim of wharfage and demurrage charges claimed by the plaintiff. On record there is material to show that there was an auction sale after giving notices to the parties. Notices are on record. The public advertisement issued is on record. The government gazette in which the said auction sale was notified is also on record. The amount offered and the amount received and the details of the work out of the amount received and adjusted towards the demurrage charges of the plaintiff is also on record. Apart therefrom the plaintiff has also led evidence of two witness who has categorically stated that the said goods were sold in auction towards the recovery of the demurrage charges and other expenses of the said consignment. The said deponent has also deposed that the notices were

given to the defendants but the defendant did not clear the goods and the auction has taken place after completing all the steps prior to the sale of the goods as contemplated under s.61, 62. It is true that the valuation report has not been produced by the plaintiff in the present suit. But mere absence of the valuation report in my opinion cannot infer that there has been no auction of the sale goods nor there was any demurrage charges payable by the defendant. As against this both the defendants no.2 and 3 have not stepped in the witness box and therefore necessary adverse inference is also required to be drawn. The argument of the learned counsel for the second defendant that this court must hold that infact the plaintiff have failed to prove that there was any liability of the defendant and there was no auction sale of the said goods. The said argument in my opinion cannot be accepted in the light of the aforesaid material and evidence on record. In view thereof I reject the same.

18. This now takes me to the next contention

advanced by the learned counsel for the second defendant, namely, that the documents on record indicates that there was no valid auction sale of the suit consignment. It has been contended by the learned counsel for the second defendant that for the purpose of identification of the goods it is admitted by the witness that there has to be identification mark on the consignment. The learned counsel has further contended that in absence of such identification mark the goods could not be identified and thus cannot be placed for sale. The learned counsel has further contended that the document which has been produced namely the newspaper advertisement, government gazette notices as well as the statement indicating the sale of the goods does not have anything to correlate to show that it was the suit consignment which was put up for auction and sold by the plaintiff for the recovery of the demurrage charges. It is his case that the identification mark is the sole method and source on the basis of which it can be identified which goods has been put up for auction by the plaintiff. The learned

counsel for the second defendant insupport of the aforesaid argument has relied upon bye-law no.78 bye-laws of B.P.T. which inter-alia provides that notwithstanding the provisions of of Bye-laws Nos.77,81 and 85, vessels discharging cargo in the Docks shall tender such cargo in separate lots as identified by applicable ocean bills of lading and marks. It has been thus contended by the learned counsel for the second defendant that the identification mark on the cargo is the must without which no cargo can be identified and thus cannot be placed for sale for the arrears of the demurrage charges. He has also relied upon a document which has been produced by him being Exh.D.1. The said Exh.D.2 is the shed register of inquiries regarding the goods available for delivery. By relying upon the said document and the markings and numbers given to the said consignment therein according to the defendant no.2 the said godos were identified with mark as HSL/LALDEE Bombay. According to the learned counsel for the defendant no.2 this identification mark ought to have been provided for on the said

notices in the newspaper and the Maharashtra Government Gazette so that people can identify which cargo has been put up for auction sale by the plaintiff.

19. On the other hand the learned counsel for the plaintiff has contended that the goods can be identified not merely by the identification mark on the consignment which is placed on the goods before the same is landed on port byt once the goods are landed they are always identified by the Import General Manifest number which is given after landing. Learned counsel for the plaintiff has submitted that the plaintiff has able to establish that the import general Manifest number given to the sale goods is 1749/500.

20. Considering the rival submissions of the parties I am of the opinion that the said contention of the defendant no.2 is devoid of any merits. The IGM number and the date is mentioned as well the item number mentioned on the goods all throughout once the goods are landed and entry is

made in Import General Manifest. The consignment has been identified by the Import General Manifest number and the Item number placed therein. The said import general manifest number and the item number are mentioned in all the notices for sale which has been issued by the plaintiff. It is also mentioned in all the correspondence and the goods have been identified by the same. Even the summary of auction sale as well as the statement of unclaimed goods sold by public auction i.e. 14.6.2002 are identified by bill entry number 1791 and Item no.500 as noted in Import General Manifest. Learned counsel for the defendant no.2 has however contended that, that it is irrelevant that the goods are so identified. According to him marking on the consignment can be the only source of identification of the said goods. He has in support of the same relied upon Ex.D.2 Infact the said exh.D.2 also identifies the goods by bill of entry no. being 1791 and Item No.500. When it was pointed out to the learned counsel for the second defendant that exh.D.2 is essentially based on the said consignment number and item number for the

purpose of identification of the goods and therefore merely because there is a marking put on the consignment that could not be the only source of the identification, the learned counsel for the defendant contended that though the documents Exh.D.2 has been produced by the second defendant in the course of evidence itself still he contends that he is not aware of any IGM number and item number for the purpose of identifying the said goods. He has purportedly contended that Exh.D.2 is in only partially admitted by him i.e. the lower portion of the document is admitted by him whereas the upper portion of the document he does not admit. Merely because the upper portion indicates the IGM number and item number the learned counsel has put forward a false argument that the document emancipated from his custody and produced by him in his evidence is admitted by him only in part and disputed by him in part. I am unable to subscribe to any such argument advanced by the learned counsel for the defendant no.2. The consignment in the present case in my opinion is duly identified by bill of entry/IGM number 1791

and Item no.500. Merely because the public notice and or the government gazette issued by the plaintiff does not indicate the marking placed on the consignment it is not possible to accept that in absence of the same mark, the auction sale is invalid and or nonexistent. In the circumstances I reject the contention advanced by the learned counsel for defendant no.2.

21. Now turning to the contention of the third defendant the learned counsel has contended that the third defendant is not liable to make payment of the dues to the plaintiff being the port trust authority. He has contended that the third defendant has already discharged the cargo and has endorsed the bill of lading in favour of the defendant no.1 and thus the defendant no.1 is the only person who is liable and the defendant no.3 being a shipper or a shippers agent cannot be held liable in the matter. However the learned counsel for the plaintiff has relied upon a judgment of the apex court in the case of **Trustees of the Port of Madras through its chairman of Vs. M/s. K.P.V.**

Sheikh Mohd. Rowther and Co.P.Ltd and Ors reported in AIR 1995 SC 1922 and has contended that in view of the aforesaid judgment unless the defendant no.3 shows that infact there was an endorsement on the bill of lading of the defendant no.3 in favour of the third party, he continues to be liable and thus cannot be stated that the defendant no.3 is not liable inrespect of the claim of demurrage and port trust charges. It has been contended that the defendant no.3 has failed to establish that the said bill of lading has already been endorsed to third party. It is contended that till and untill the said Bill of Lading is endorsed the defendant no.3 continues to be the owner of the goods and thus liable for payment of the aforesaid charges. Insupport of the aforesaid contention the learned counsel has relied upon the following para of the aforesaid judgment :

> . The obligation to deliver the goods to the consignee has been taken over by the port trust under the provisions of the statute and the shipowner is relieved of the liabililty for lioss or damage to the goods from the moment the goods are taken charge of by the port trust as per section 39 of the act. Once

> the goods are handed over to the Port Trust by the steamer and the steamer agents have duly endorsed the bill of lading or issued the delivery order, their obligation to deliver the goods personaly to the owner or the endorsee comes to an end. The subsequent detention of the goods by the Port Trust as a result of the intervention by the customs authorities cannot be said to be on behalf of or for the authorities cannot be said to be on behalf of or for th e benefit of the steamer agents. Generally, if there is a delay int aking delviery of the goods by the consignee withina reasonable time, the steamer or its signee within reaonable time the steamer or its agent can warehouse the goods. In such an event the warehouseman has an independent claim against the consignee or endorsee for teh demurrge charges. The positonc annot be different merelyu because the customs authorities have intervened. The position of the Port trust is the same as that of a warehouse man whose responsibilty for the custody of the goods after the transit has come to an end and after the bill of lading has been duly endorsed or a delivery order issued."

22. On the other hand the learned counsel for the defendant no.3 has contended that the shipping agent is not liable once for the delivery of the goods the bill of lading is handed over to the defendant no.2. He has pointed out the evidence in the present matter and has contended that the goods once landed comes in the custody of the port trust

authority and even before filing of the bill of entry the bill of lading is required to be handed over by way of transfer to the defendant no.1. It is also established on evidence that infact the said bill of entry was filed both with the customs authority as well as the Port Trust Authority by the defendant no.1 and thus he has contended that he is no more liable to make payment of any demurrage charges. Learned counsel for the defendant no.3 has insupport of the aforesaid argument relied upon the judgment of the apex court in the case of **The Board of Trustees of the Port of Bombay and Ors Vs. M/s. Sriyanesh Knitters etc reported in 1999(4) Bom.C.R. 830** particularly para-25 of the said judgment which reads as under :

> 25 Section 2(o) contains the definition of 'owner'. In relation to goodsthe said section states that the word 'owner' includes any consignor, consignee, shipper or agent for the sale, custodya, loading or unloading of such goods. By referrring to this sub-section this court in (Sun Export corporation and another v. Board of Trustees of the Port of Bombay) 1998(1) SC.C. 142 held that in the case of imports the liability to pay demurrage, on the endorsement being made on te bill of lading, would be that of the consigneee. This is in consonance with the provisions of the Bills of Lading Act, 1856.

The preamble of this Act provides that by custom of mercvhants a bill of lading of goods beiong transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in thebill of lading continue in the original shipper or owner and, therefore, it is epedient that such rights should pass with a property. Section 1 of the Bills of Lading Act provides that rights under bills of lading vest in the consignee or endorsee and reads as under :

> 1. Rights uinder bills of lading to vest in consignee or endorsee...Every consigneee of goods named in a bnill of landing andn every endorsee of a bill of ladiong to whom the property in the goods herein mentioned shall pass, upon by reason of such consignment or endrosemetn, shall have teransferredt o and vested in him all rights of suit, and be subject to the same liabilities in respect opf such goosd as if the contract contained in the bill of lading had been made with himself."

The provisions of section 2(o) of the M.OP.T. Act regards, in relation to goods, the consignee as the owner thereof. Reading the same along with the bills of lading Act the consigneee of the goods named in the bill of lading or every endorsee of the bill of lading, for the purpose of M.P.T. Act is regarded as the owner of the goods and it is from that owner that

> the appellant is entitled to recover charges under the M.P.T. Act inrespect of the said goods. The High Court was not right in holding that the contract was between the ship owner and the port Trust. The correct position is that the contract is between the Port Trust and the holder of the bill of lading which, in this case, would be the consignee. It is the consignee which is the bailor with the Port Trust being the consignee."

23. Learned counsel for the defendant no.3 has also relied upon a judgment of the Madras High Court in the case of **Board of Trustees of the Port of Madras Vs. M/s. Southern Shipping Corporation Private Ltd reported in AIR 2001 Madras 43** in particular para-11, 12 and 13 of the said judgment which reads as under:

> 11. In the above decision, this court has clearly laid down that by the endorsement of the bill of lading or the issue of the delivery order by the steamer agent, the property in the goods vests in consignee or endorsee and the steamer or its agents are not responsible for the custody of the goods after the property in the goods passes to the consignee. As already seen, in the present case, the second defendant has made Ex.B.2 endorsement on the original bill of lading viz. Ex.B.1 and handed it over to the first defendant and on the basis of it, the first defendant claims to have issued the delivery

order. Hence, it is clear that the custody of the goods has passed on to the consignee namely the second defendant and he is alone liable to pay the demurrage charges.

12. The learned counsel for the first respondent drew the attention of the court to a recent decision of the Apex Court and contended that the plaintiff-port trust is entitled to recover charges under the Major Port Trusts Act in respect of the goods from the owner of the goods only. The relevant decision is Board of Trustees of the Port of Bombay v. Sriyanesh Knitters, reported in (1999) 7 SCC 359: (AIR 1999 SC 2947) and it is held as follows :

> :25. section 2(o) contains the definition of 'owner'. In relation to goods the said section states that the word 'owner' includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods. By referring to this section this court in Sun Export Corpn. vs. Board of Trustees of the port of Bombay AIR 1998 SC 92 held that in the case of exports the liability to pay demurrage, on endorsement being made on the bill of lading, would be that of the consignee. This is in consonance with the provisions of the Bills of lading act, 1856. The preamble of this act provides that by the custom of merchants a bill of lading of goods being transferable by endorsement the property and the goods may thereby pass to the endorser, but nevertheless all rights in respect of a contract contained in the bill of lading continue in the original shipper or owner and, therefore, it is expedient that such rights should pass with a property. Section of the bills of lading Act provides that rights under

bills of lading invest in the consignee or endorsee and reads as under :

1. Rights under bills of lading to vest in consignee or endorsee- Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract obtained in the bill of lading had been made with himself."

The provision of Section 2(o) of the M.P.T. Act regards, in relation to goods, the consignee as the owner thereof. Reading the same alongwith the bills of lading Act the consignee of the goods named in the bill of lading or every endorsee of the bill of lading g, or the purpose of the MPT Act is regarded as owner of the goods and it is from that owner that the appellant is entitled to recover charges under the MPT Act in respect of the said goods. The High Court was not right in holding that the contract was between the ship-owner and the Port Trust. The correct position is that the contract is between the Port Trust and the holder of the bill of lading which, in this case, would be the consignee. It is the consignee which is the bailor with the Port Trust being the consignee (sic bailee)."

> 13. The contract is between the Port of Trust and the holder of the bill of lading viz. the consignee. The consignee is the bailor and the Port Trust is the bailee and the consignee of the goods, named in the bill of lading for the purpose of their port Trusts Act, as regarded as owner of the goods irrespective of the endorsement on the bill of lading or issue of the delivery order by the steamer agent. The Port Trust is entitled to recover charges under the Major Port Trusts Acts in respect of the goods from the owner, viz. the consignee. In the present case, the plaintiff is entitled to recover demurrage charges in respect of the goods namely the second defendant and the first defendant is not liable for the same."

24. In my opinion in view of the aforesaid judgments of the apex court and Madras High Court there is no matter of doubt that the defendant no.3 is not liable to make payment of any demurrage charges. It is an admitted position that the defendant no.3 is only sued in his capacity as a shipper and/or as an agent of the shipper. The defendant no.3 is neither the consignee nor the importer of the said goods. The defendant no.3 though can be termed as ‘owner’ within the definition under s.2(o) of the Act but once he has discharged the cargo from the ship and handed over the bill of lading to importer duly endorsed his

liability ceased to exist. However the defendant no.3 in my opinion has been able to establish that the said goods are landed in the port and thus they have handed over the Bill of Lading to the defendant no.1 for clearance of the said goods. Thus they are not liable for any claims of demurrage or other charges of the plaintiff. In the aforesaid circumstances I pass the following decree :

. There shall be decree in favour of the plaintiff and against the defendant no.1 and 2 for the sum Rs.22,40,000/- with interest. at the rate of 9% p.a. from the date of the suit till payment and/or realisation. Suit as against defendant no.3 is dismissed. However there shall be no order as to costs.

sd/-

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